

FIRST APPEAL No. 568 OF 1999

Against the judgment and decree dated 27.8.1999 passed by Sri Diwakar Singh, Subordinate Judge-I, Bhagalpur in Money Suit No. 13 of 1995.

MODERN FOOD INDUSTRIES (INDIA) LIMITED AND ANOTHER

..... Defendants/Appellants

Versus

M/S NANDLAL & COMPANY & ORS

..... Plaintiffs/Respondents

For the Appellants : Mr. N.K. Agarwal, Sr. Advocate
Mr. Jayant Roy Chaudhary

For the Respondent No.1 : Mr. S.K. Verma, Sr. Advocate
Mr. K.K. Tiwary, Advocate
Mr. Jitendra Kishrore Verma, Advocate
Mr. Lokesh Kumar, Advocate

Dated : 28th day of January, 2011

P R E S E N T

THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

J U D G M E N T

Mungeshwar Sahoo, J.

1. The defendants have filed this first appeal against the judgment and decree dated 27.8.1999 (the decree signed on 10.9.1999) passed by Sri Diwakar Singh, the learned Subordinate Judge - I, Bhagalpur in Money Suit No. 13 of 1995 decreeing the plaintiff-respondent No.1's money suit for Rs.24,39,884.24 paise.

2. The plaintiffs filed the aforesaid money suit for realization of Rs.24,39,884.24 paise from the defendant No.1. The plaintiffs' case in

short is that it is a partnership firm and is registered with the Government of Bihar and carries out civil constructions. The defendants issued tender notice for a project of Rs.30,00,000/- and the period for completion of the said project was seven months. The plaintiff submitted tender on 8.6.1984 which was accepted by defendant No.3. The agreement was signed between the parties on 9.8.1984 and then the plaintiff started the work and completed the same on 30.8.1985. The measurements were not recorded and were done on 12.8.1986. Since the prices of material and wages of labour had increased by the time when the plaintiff started working he submitted claim for Rs.6,50,000/-. Subsequently the final bills were withheld by the defendants as stated in the plaint. The minute details of the pleadings are not necessary in this case and, therefore, are not mentioned in detail. The plaintiff claimed Rs.409789/- towards escalation in the price of material and labour, 18% interest per annum on Rs.92,973/- and also refund of Rs.4,93,788.34 paise being the rebate on the value of the work and refund and sales tax etc. and filed the suit.

3. The defendant Nos. 1 to 4 appeared and filed written statement contending that the suit is not maintainable because of mis-joinder and non-joinder of necessary parties, cause of action and further that the claim is false, frivolous, imaginary and wrong. The claim of price for escalation was denied by the defendant. They have also denied the story of withholding sale tax and also denied the liability to pay interest. It was contended that the suit is not maintainable under Section 32 of the Indian Arbitration Act.

4. On the basis of the above pleadings the learned court below framed the following issues :

"1- Is the suit of the plaintiff as framed maintainable ?

2- Has the plaintiff got valid cause of action for the suit ?

3- Is the plaintiff entitled to a decree for recovery of a sum of Rs.24,39,884-24 paise plus interest against the defendants or not ?

4- To what relief or reliefs is the plaintiff entitled to ?"

5. The learned court below after discussing the evidences available on record and the points raised by the parties found all the issues in favour of the plaintiffs and, therefore, decreed the suit.

6. The learned senior counsel Mr. N.K. Agrawal appearing for the appellants raised only one question in this appeal. He submitted that on the date of presentation of the plaint the plaintiffs' suit was barred under Section 69 (2) of the Partnership Act and this point was raised by the appellants at the time of hearing of the suit in the court below but the learned court below rejected this point on the ground that there is no pleading in the written statement and there is also no evidence in support of the said fact. The learned counsel further submitted that he is not pressing any other question involved in this case except the maintainability of the suit filed by the plaintiff respondent No.1. The learned counsel submitted that since the suit itself was not maintainable as barred under Section 69 (2) of the Partnership Act the judgment and decree passed by the court below is a nullity and, therefore, has to be set aside. The learned counsel in support of his contention relied upon various decisions. I will discuss the said decision later on. On this point alone the learned counsel for the appellants submitted that the judgment and decree are liable to be set aside.

7. On the other hand the learned Senior Counsel Mr. Verma appearing on behalf of the respondent No.1 submitted that Section 69(2) of the Partnership Act does not affect the jurisdiction of the court and this provision is made primarily for the benefit of the defendants and it does not relate to the public interest at large. According to the learned counsel since the provision was made for benefit of the defendant the defendant can waive the said provision by not raising objection to the maintainability of the suit on that ground and moreover Section 69 of the Partnership Act is not an absolute bar to the institution of the suit. It bars the claim of the plaintiffs relating to claim arising out of a contract if the plaintiffs' firm is unregistered with the registrar of Partnership but it does not bar the claim of the plaintiffs so far it relates to the plaintiffs' general title. The learned counsel further submitted that in this case the defendant did not raise this objection in the written statement nor there was any evidence in support of this fact. Had it been raised by him in the written statement the plaintiff could have come out with a suitable answer to the said objection. The learned counsel further submitted that moreover before appearance of the defendant in the suit itself the plaintiffs' partnership firm was registered with the registrar partnership on 8th February 1998 under Sl. No. 15 of 1996 and, therefore, the objection which was available to the defendant which he could have taken in the written statement ceased to exist. In support of this contention he relied upon various decisions.

8. In reply to the above contention of the learned counsel for the respondents Mr. Agrawal appearing on behalf of the appellants submitted that subsequent registration of the firm will not save the suit because it was not registered on the date of presentation of the

plaint and, therefore, the plaint was not a plaint in the eye of law, therefore, it would not have been revived on subsequent registration.

9. In view of the above contention of the parties the only point arises for consideration in this appeal is as to whether the impugned judgment and decree are nullity in the eye of law and are liable to be set aside because the partnership firm was not registered on the date of presentation of the plaint although subsequently it was registered.

10. It may be reiterated here that except this ground the learned counsel for the appellants has not addressed to this court on any other point and, therefore, this question is purely a question of law. For deciding this question the pleadings of the parties are not necessary. Admittedly on the question of presentation of the plaint the plaintiffs' firm was not registered. It is also admitted fact that the defendants in the written statement had not taken specific plea about the maintainability of the suit being barred under Section 69 sub section 2 of the Partnership Act.

11. It may be mentioned here that during the pendency of this appeal the appellants filed an application being I.A. No. 112 of 2001 on 9.1.2001 under Order 6 Rule 17 C.P.C. praying for amendment of the written statement to the effect that the plaintiffs' suit is not maintainable because plaintiff's firm is not registered under Section 59 of the Indian Partnership Act on the date of institution of the suit. The plaintiffs-respondents also filed I.A. No.5738 of 2001 under Order 6 Rule 17 C.P.C. seeking permission to amend the plaint to the effect that the plaintiff's firm has been registered on 8th February 1996 and another application being I.A. No. 1559 of 2002 was filed by the plaintiff-respondent No.1 under Order 41 Rule 27 C.P.C. seeking permission to adduce additional evidence permitting to bring on record

the certificate of registration dated 8.2.1996. It may be mentioned here that this Court directed that all these interlocutory applications shall be considered at the time of final hearing of the appeal.

12. During course of hearing of this appeal on 9.12.2010 Mr. Agrawal appearing on behalf of appellants submitted that he will not press his amendment application being I.A. No. 112 of 2001. Accordingly, the said application was rejected as not pressed on 9.12.2010. In view of the facts that the amendment application was not pressed by Mr. Agrawal the learned counsel Mr. Verma appearing on behalf of respondents also did not press the interlocutory application filed by him i.e. I.A. No. 5738 of 2001 and I.A. No. 1559 of 2002 and, therefore, these two interlocutory applications were also rejected as not pressed.

13. Now in view of the above facts, it stands admitted that on the date of presentation of the plaint i.e. on 14.3.1995 the plaintiff firm was not registered with the registrar of partnership. Subsequently it was registered on 8th February 1996. From perusal of the cause of action portion it appears that the date for cause of action has been mentioned as 30.5.1993. Therefore, if the cause of action arose on 30.5.1993 then the suit could have been filed within three years from the said date by the plaintiffs. Admittedly, it was registered on 8.2.1996. Now if the appellants' submission is accepted that the suit was barred under Section 69(2) of the Partnership Act then the plaint could have been rejected under Order 7 Rule 11(d). Then also a fresh suit could have been filed by the plaintiffs according to Order 7 Rule 13 on the same cause of action. The plaintiffs could have filed the said suit immediately after registration on the ground that it is now already registered, if that happens then that could only result in giving a fresh number to the suit which would further delay the proceeding before

the Court as it would be a freshly filed suit having a new number. Thus, adjudicatory process would be further delayed. Such a situation in the present days when the court is heavily loaded and arrears are mounting should be avoided. Such a technical contention which does not advance the cause of justice should be rejected. The courts always lean in favour of curing such technical obstacle which has no bearing on the merit of the controversy between the parties. At best in this present situation it can be treated that the plaint was presented on the date of registration.

14. The learned counsel for the appellants relied upon **AIR 1939 Patna 239 Firm Laduram Sagarmal Vs. Jamuna Prasad Chaudhari and others**, **AIR 1960 Orissa 12 Popsingh Mahadeo Prasad Vs. Dipchand Ray and another**, **AIR 2003 Andhra Pradesh 418 The Andhra Pradesh Co-operative Wool Spinning Mills Limited and another Vs. G. Mahanandi and Company Wool Merchants and others**, **AIR 1977 SC 336 Loonkaran Sethia etc., Vs. Mr. Ivan E. John and others etc.** On the basis of these decisions the learned counsel for the appellants submitted that a suit which is not maintainable for non-compliance of Section 69 cannot become maintainable at later stage by reason of subsequent registration. Subsequent registration cannot cure the initial defect. The learned counsel also relied upon **AIR 1989 SC 1769 M/s Shreeram Finance Corporation Vs. Yasin Khan and others** in support of his contention. It appears that in the case of **AIR 1939 Patna 239 Firm Laduram Sagarmal (Supra)** and in those decisions cited by the learned counsel for the appellants it has been held that subsequent registration cannot cure the initial defect. The plaint filed by unregistered firm is in effect no plaint at all because Section 69 makes claim arising out of a contract unenforceable if the firm is unregistered

on the date of filing the suit. An unregistered firm has no right to sue and a plaint filed by it has no legal effect. It appears that in these cases there was pleading in the written statement regarding the bar under Section 69 of the Partnership Act. So far the present case is concerned admittedly there is no plea raised in the written statement by the appellants.

15. In **AIR 2000 Karnataka 236 Andavar Finance Corporation Vs. V. Murthy and another** it has been held that when a plea is not raised in the written statement it is not open to the court to look into the question of maintainability of the suit under Section 69 (2) of the Indian Partnership Act. In **AIR 1964 SC 1300 Dhirendra Nath Gorai and others Vs. Sudhir Chandra Ghosh and others**, the Hon'ble Supreme Court at page 1304 held that there was no inconsistency between the proposition that the provision of Section 80 of the Code of Civil Procedure were mandatory and must be enforced by the Court and that they might be waived by the authority for whose benefit it was provided. Section 80 of the C.P.C. was explicit and mandatory but still it is held that it could be waived by the authority for whose benefit that was provided. In the present case at our hand also although it has been held that provision under Section 69 of the Partnership Act is mandatory the defendants for whose benefit this provision was made waived the said right by not raising the plea in the written statement. In **AIR 1957 Patna 4 Kuldip Thakur Vs. Shiv Mangal Prasad Thakur and another**, this court held that the disability created by sub Section 2 of Section 69 of the Partnership Act is with regard to the right to institute a suit and not with regard to the power of the court to pass a decree. The prohibition contained in Section 69(2) is only to the institution of the suit. The plea of non-maintainability of a suit on behalf of unregistered firm is not available

to a judgment debtor at the execution stage. Such an objection should be taken in the suit itself before the passing of the decree. If such an objection is not taken in the suit and a decree is passed the decree is not a nullity, if the court otherwise has inherent jurisdiction to pass the decree. A division bench of Patna High Court in **AIR (32) 1945 Patna 286 Mohamad Ali Vs. Karji Kondho Rayaguru** held that whether the firm was or was not actually registered under the Partnership Act is a mixed question of fact of law and the point cannot be raised in first time in second appeal. Here since it is the defendant who intends to contest on this ground that the firm was not registered it was for him to plead according to Order 6 Rule 6 read with Order 8 Rule 2 C.P.C. and if the point is not raised in the pleadings the question was not at all before the court.

16. The learned counsel for the appellants submitted that this point was raised at the time of argument of the case but the learned court below rejected the claim on the ground that there is no pleading. So far this submission is concerned it may be mentioned here that it is well settled principle of law that no evidence can be relied upon without there being any pleading. From perusal of the judgment it appears that at the time of argument it was only stated that the plaintiffs' firm was unregistered. So far this contention is concerned admittedly neither there was any pleading nor there was any evidence in support of the said fact. It is also well settled principle of law that whether the partnership firm is registered or not is a question of fact. There is no provision either in the Partnership Act or in the C.P.C. that the plaintiffs' partnership firm must aver in the plaint that it is registered under Partnership Act. It is also well settled principle of law that a decision of a case can not be based on grounds outside the pleadings of the parties and it is a case pleaded that has to be found.

17. In **AIR 1984 Madras 47 N.A. Munavar Hussain Sahib Vs. E.R. Narayanan and others** a Division Bench of the Hon'ble Madras High Court at paragraph 17 has held that the plea regarding the maintainability of the suit by reason of the operation of 69 of the Partnership Act is a mixed question of fact and law and if such plea is not raised at all there will be no evidence relating to that aspect with the result that facts necessary for its determination would be absent. It is on account of this that courts have consistently taken the view that if the plea had not been raised in the written statement it would not be allowed to be raised at a later stage in the proceeding. Further like the provision in the Limitation Act there is no provision in the provision in the Partnership Act which compels the court to dismiss the suit on the ground of non-registration of the firm *suo motu* even if no plea in that regard had been raised by the defendants in the written statement. From perusal of the said decision it appears that various decision of different High Courts have been considered including **AIR 1985 Patna 286**.

18. In another case a Division Bench of Madras High Court in **AIR 1972 Madras 86 (V 59 C 26) Jalal Mohammed Ibrahim (died) and others Vs. Kakka Mohammed Ghoush Sahib** held that a decree passed in a suit filed by an unregistered firm is not a nullity. No doubt the Hon'ble Supreme Court in the case of **AIR 1977 SC 336 (Supra)** cited by the learned counsel for the appellants held Section 69 is mandatory in character but it appears in that case there was specific plea raised in the written statement vide paragraph 7 of the judgment that the suit was barred by the provisions of Section 69 of the Partnership Act.

19. The learned counsel for the appellants gave much emphasis on the decision of the Hon'ble Supreme court i.e. **A.I.R. 1989 SC**

1769 (Supra) and submitted that the subsequent registration will not validate the suit. From perusal of the decision it appears that there was change in situation of partnership firm in that case. The Hon'ble Supreme Court held that the partners as on the institution of the suit were not shown partners in the register of firm and the result is that the suit was not maintainable in view of sub section 2 of Section 69. The Hon'ble Supreme Court also held that although the names were shown subsequently in the register it will not validate the suit. So far this decision is concerned subsequently the Hon'ble Supreme Court in **AIR 1998 SC 3085 M/s Raptakos Brett and company limited Vs. Ganesh Property** at paragraph 30 after considering the above decision doubted the correctness of the said decision and held that a re-look at the decision of the two member bench of the Hon'ble Court is necessary. It appears that in that case the Hon'ble Supreme Court framed three questions for consideration. The second question was if the suit was so barred whether subsequent registration of the plaintiffs' firm under the Partnership Act would revive the suit or make it competent at least from the date on which such registration is pending the suit was obtained by the respondent's firm. While deciding the said question the Hon'ble Supreme Court at paragraph 30 has held that **it is obvious that even if the suit is filed by an unregistered partnership firm, against a third party and is treated to be incompetent as per Section 69, sub-section (2) of the Partnership Act, if pending the suit before a decree is obtained the plaintiff puts its house in order and gets itself registered the defect in the earlier filing which even though may result in treating the original suit as still born, would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained. If such an approach is adopted, no real harm would be caused to either side. As**

rightly submitted by Dr. Singhvi that, Order 7, Rule 13 of the CPC would permit the filing of a fresh suit on the same cause of Action and if the earlier suit is permitted to be continued it would continue in the old number and the parties to the litigation would be above to get their claim adjudicated on merits earlier while on the other hand if such subsequent registration is not held to be of any avail, all that would happen is that a fresh suit can be filed immediately after such registration and then it will bear a new number of a subsequent year. That would further delay the adjudicatory process of the Court as such a new suit would take years before it gets ready for trial and the parties will be further deprived of an opportunity to get their disputes adjudicated on merits at the earliest and the arrears of cases pending in the Court would go on mounting. It is axiomatic to say that as a result of protracted litigation spread over tiers and tiers of Court proceedings in hierarchy, the ultimate result before the highest Court would leave both the parties completely frustrated and financially drained off. To borrow the analogy in an English poem with caption "death the leveler", with appropriate modifications, the situation emerging in such cases can be visualized as under: "upon final Court's purple alter see how victor victim bleed." All these considerations in an appropriate case may require a re-look at the decision of the two – member Bench of this Court in 1989 (3) SCC 476 : (AIR 1989 SC 1769) (supra).

20. Therefore, these decisions of the Supreme Court is complete answer to all the points raised by the learned counsel for the appellants and also a complete answer to all the decisions cited by the

learned counsel for the appellants. It is admitted fact that during the pendency of the suit the partnership firm was registered. Even if it is held that the suit was not maintainable on the date of presentation of the plaint the plaintiffs could have filed afresh suit immediately after registration on 8.2.1986 which is within the limitation period. Therefore, the only objection is that the first suit is not maintainable but on presentation of the second plaint after rejection of the earlier plaint this objection could not have been taken by the defendant. Their might be some delay in disposal of the suit but it neither goes to the root of the merit of the case. The Hon'ble Court in **AIR 1998 Supreme Court 3085 (Supra)** considered all these aspects of the matter and as mentioned above decided this aspect of the matter. Moreover, this decision of the Hon'ble Supreme Court is more elaborate and clearly fit to the present case than the case cited by the learned counsel for the appellants.

21. In view of the above discussion, I find that the impugned judgment and decree cannot be set aside on the ground that on the date of presentation of the plaint the suit was not maintainable as barred under Section 69(2) of the Partnership Act because subsequently, during the pendency of the suit itself prior to appearance of the defendants the plaintiffs' firm was registered on 8.2.1996 therefore, even if the suit was not maintainable on the presentation of the plaint on 14.3.1995 it can be held that suit was maintainable from the registration of the firm and no prejudice is caused to the defendant if the old number of the suit is continued and moreover no objection was raised by the defendant in the written statement thereby waiving the bar of this provision which has been enacted for benefit of the defendant because the jurisdiction of the court is not barred. In other words, it cannot be said that the court

had no inherent lack of jurisdiction. Further the question whether firm is registered or not is a pure question of fact and, therefore, it was for the defendants to have specifically pleaded. In the present case on the date of filing of written statement such a plea was not available to the defendant because the firm was registered on 8.2.1996 and the written statement has been filed on 17.7.1996. Therefore, at this appellate stage the appellants is harping only to the fact that on the date of institution of suit the suit was barred under Section 69 sub section 2 of the partnership Act although subsequently, it was registered prior to the appearance of the defendants. I therefore, find that the impugned judgment and decree cannot be termed as nullity on the ground that the suit was not maintainable on the date of institution of the suit being barred under Section 69(2) of the Partnership Act as in this case admittedly subsequently during the pendency of the suit the firm has been registered and thereafter written statement has been filed.

22. In view of my above discussion, I therefore, find no merit in this appeal and in the result, this first appeal is dismissed. In the facts and circumstances of the case there shall be no order as to costs.

(Mungeshwar Sahoo, J.)

Patna High Court, Patna
The 28th January, 2011
S.S./A.F.R.